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In the Supreme Court of the United States

KELLY A. AYOTTE,
ATTORNEY GENERAL OF NEW HAMPSHIRE, *et al.*
Petitioners,

v.

PLANNED PARENTHOOD
OF NORTHERN NEW ENGLAND, *et al.*
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF AMICI CURIAE FOR THE CENTER FOR ADOLESCENT HEALTH & THE LAW; THE NATIONAL ASSOCIATION OF SOCIAL WORKERS; THE NATIONAL ASSOCIATION OF SOCIAL WORKERS, NEW HAMPSHIRE CHAPTER; AND SIX OTHER ORGANIZATIONS SUPPORTING RESPONDENTS

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N.H. Rev. Stat. Ann. § 627:6 (2005) 5

OTHER AUTHORITIES

Abigail English & Kirsten E. Kenney, Center for Adolescent Health & the Law, *State Minor Consent Laws A Summary* (2d ed. 2003) 4

Adam Liptak, *On Moral Grounds, Some Judges Are Opting Out of Abortion Cases*, The New York Times, September 4, 2005, *available at* http://www.nytimes.com/2005/09/05/national/04recuse.html?oref=login&pagewanted=print 19

American Academy of Pediatrics, Committee on Pediatric Emergency Medicine, *Policy Statement: Consent for Emergency Services for Children and Adolescents* (Mar. 2003), ttp://aappolicy.aappublications.org/cgi/content/full/pediatrics;111/3/703 7

American Academy of Pediatrics, *The Adolescent's Right to Confidential Care When Considering Abortion*, 97 Pediatrics 756 (1996) 13

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Fay A. Rosovsky, *Consent to Treatment: A Practical Guide* (3d ed. 2001) 3, 4

Helena Silverstein & Leanne Speitel, *Honey, I Have No Idea: Court Readiness to Handle Petitions to Waive Parental Consent for Abortion*, 88 Iowa L. Rev. 75 (2002).....16, 17, 18

Helena Silverstein, *Road Closed: Evaluating the Judicial Bypass Provision of the Pennsylvania Abortion Control Act*, 24 Law & Soc. Inquiry 73 (1999).....16. 18, 19

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Janet Gallagher, *Prenatal Invasions & Interventions: What's Wrong With Fetal Rights*, 10 Harv. Women's L.J. 9 (1987)..... 11

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New Hampshire District Court, *Domestic Violence Case Protocols*, Ch.3 http://www.courts.state.nh.us/district/protocols/dv/index.htm 15, 16

New Hampshire District Court Improvement Project, in Cooperation With the Family Division and N.H. Probate Court, *Protocols Relative to Abuse & Neglect Cases and Permanency Planning*, Ch. 3 (Apr. 2003), http:/www.courts.state.nh.us/district/protocols/abuseneglectprotocal.htm 15

New Hampshire Bar Ass'n, *Domestic Violence: It Helps To Know The Law* (May 2000), http://www.nhbar.org/for-the-public/domestic-violence-it-helps-to-know-the-law.asp 15

New Hampshire Judicial Branch, *2005 Court Holidays*,http://www.courts.state.nh.us/sitewidelinks/court_holidays.htm 13

New Hampshire Judicial Branch, *Domestic Violence Restraining Orders*, http://www.courts.state.nh.us/superior/selfhelp/Restraining%20Orders.htm 15

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New Hampshire Practice Series: Personal Injury: Tort and Ins. Practice § 6:05 (2005) 5

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Suellyn Scarnecchia & Julie Kunce Field, *Judging Girls: Decision Making in Parental Consent to Abortion Cases*, 3 Mich. J. Gender & L. 75 (1995) 19

INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are a number of organizations that, among other things, advocate to ensure that minors have effective access to health care, including reproductive health care. *Amici* include the Center for Adolescent Health & the Law; the National Association of Social Workers; the National Association of Social Workers, New Hampshire Chapter; the National Center for Youth Law; Jane's Due Process, Inc.; the Judicial Consent for Minors Lawyer Referral Panel; the Juvenile Law Center; the Women's Bar Association of Massachusetts; and the Women's Law Project. *Amici* share an interest in ensuring that young women's ability to obtain immediate health care in emergency situations, including emergency situations involving abortion procedures, is not compromised.

SUMMARY OF ARGUMENT

As a matter of established law and accepted medical practice, doctors may treat patients in medical emergencies without parental consent, if danger to the minor's health or life requires immediate action and the minor's parents or guardian are not available. Doctors may and do act quickly to provide necessary emergency treatment, without first going to court for permission, in a wide variety of contexts. There are good reasons for this rule: It ensures that doctors give patients the medical care they need in emergencies without fear of liability

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1 Letters of consent have been filed with the Clerk. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

and without the delay inherent in a requirement that doctors seek court permission.

New Hampshire's Parental Notification Prior to Abortion Act (the "Act") creates an unwarranted and unwise exception to this general rule, subjecting doctors to criminal liability if they perform emergency abortion procedures necessary to preserve young women's health without sending notice to the young woman's parents and waiting 48 hours. The State, however, contends the Act "adequately protects the health" of young women notwithstanding the lack of a health exception, because, it argues, young women and their doctors can use the Act's judicial bypass procedures to go to court and get judicial permission for a necessary emergency abortion. Implicitly recognizing, moreover, that any delay caused by a requirement for judicial permission will threaten young women's health, the State asserts that young women and their doctors will be able to get a court hearing *immediately* in emergency situations. Pet. Br. at 22.

The State's contention that the Act's judicial bypass procedure effectively protects young women's health in medical emergency situations is not accurate. To the contrary, requiring young women facing health-threatening medical emergencies to go to court will inevitably add delay, and thus increase the threat to young women's health. *See* J.A. 23-26; Brief of American College of Obstetricians and Gynecologists, *et al.*, as *Amici Curiae*. Requiring a young woman and her doctor facing such a medical emergency to learn about the bypass procedure, locate a judge, schedule a hearing, familiarize the court with the details of the minor's medical condition and the potential risks to her health, and convince the court of the necessity for an immediate abortion will inevitably delay necessary emergency treatment.

Moreover, even if the nature of the judicial process itself did not create delay, there is no assurance that minors and their doctors would have the kind of *immediate* access to courts in emergency situations that even the State concedes is necessary to protect women's health. The available evidence is to the contrary. New Hampshire courts do not appear to assure that young women and their doctors will have the ability to obtain an immediate hearing and decision – particularly when medical emergencies occur, as they inevitably will, after courts are closed or on weekends or holidays. Moreover, experience in other states has demonstrated that judicial bypass procedures often are not easily accessible to minors. That difficulty is troubling even outside the health emergency context, but could lead to immediate and serious physical consequences in a medical emergency. For all these reasons, the Court should reject New Hampshire's invitation to substitute the judicial bypass for a statutory emergency exception, and affirm the First Circuit's decision.

ARGUMENT

I. New Hampshire Would Unwisely Exempt Necessary Emergency Abortion Procedures From Established Law Permitting Doctors To Act Immediately in Medical Emergencies.

Generally, when a minor faces an immediate threat to her health or life, a physician who cannot reach a parent may nonetheless provide the care necessary to address that emergency. The doctor is *not* required to go to court first to get judicial permission before acting.[2]

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[2] James M. Morrissey, et al., *Consent and Confidentiality In the Health Care of Children and Adolescents: A Legal Guide* 50-51, 53 (1986); Fay A. Rosovsky, *Consent to Treatment: A Practical Guide* § 5.2.1 (3d ed. 2001); Angela Roddey Holder,

In the vast majority of states, that rule is established by statute.[3] In others, a common-law doctrine called "implied consent" leads to the same result.[4] New Hampshire law also permits doctors to act immediately to address emergency situations, and

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Legal Issues in Pediatrics and Adolescent Medicine 125-26 (1985); Abigail English & Kirsten E. Kenney, Center for Adolescent Health & the Law, *State Minor Consent Laws: A Summary* at iv (2d ed. 2003).

[3] English & Kenney, *supra* note 2, at iv, *passim*. *See, e.g.*, Md. Code Ann., Health-Gen. § 5-607 (2005) (provider may treat patient incapable of informed consent if treatment of an emergency nature, person authorized to give consent is not available, and doctor determines there is a substantial risk of death or immediate and serious harm to the patient and that the life or health of the patient would be affected adversely by delaying treatment to obtain consent); Minn. Stat. Ann. § 144.344 (medical services may be given to minors without parent or guardian's consent when, in the health professional's judgment, the risk to the minor's life or health is of such a nature that treatment should be given without delay and the requirement of consent would delay or deny treatment).

[4] *E.g., Miller v. R.I. Hosp.*, 625 A.2d 778, 784 (R.I. 1993) ("Equally as well established as the informed consent doctrine is the exception to it for emergencies"); *Kozup v. Georgetown Univ.*, 851 F.2d 437, 439 (D.C. Cir. 1988) (recognizing exception from requirement of parental consent in emergencies); *Luka v. Lowrie*, 136 N.W. 1106, 1110 (Mich. 1912) (parental consent to emergency amputation of minor's mangled foot implied); *Jackovach v. Yocom*, 237 N.W. 444, 449 (Iowa 1931) (parental consent to emergency amputation of minor's mangled hand implied). *Accord* Restatement (Second) of Torts § 892D (1979) (no liability for acting without consent if "an emergency makes it necessary or apparently necessary, in order to prevent harm to the other, to act before there is opportunity to obtain consent from the other or one empowered to [act] for him"); Rosovsky, *supra* note 2, § 5.2.1; English & Kenney, *supra* note 2, at iv.

provides for implied consent, in a variety of circumstances.[5]

These statutes and the underlying common-law "implied consent" doctrine wisely recognize that in emergency situations a doctor should not be restricted from acting without delay and without fear of potential liability. In such situations, parental consent may be presumed – precisely because *immediate* action is

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[5] *See, e.g.*, N.H. Rev. Stat. Ann. § 507-E:2 (2005) (to establish civil liability for a doctor's failure to obtain informed consent, plaintiffs must demonstrate that the "treatment, procedure, or surgery was performed in *other than an emergency situation*") (emphasis added); 1-13 New Hampshire Civil Jury Instructions § 13.2 (2004) ("Generally, a doctor, *in a nonemergency situation*, has a duty to obtain the consent of the patient or other person authorized to give consent prior to providing treatment.") (emphasis added); New Hampshire Office of the Attorney General, Op. No. 85-134 (Oct. 11, 1985) (describing "exceptions" to general rule that parents must consent to medical treatment for minors, including when "an emergency exists"); N.H. Rev. Stat. Ann. § 627:6(VII) (2005) (medical personnel may use reasonable force to provide necessary medical treatment in emergency when "no one competent to consent" can be consulted and "a reasonable person concerned for the welfare of the patient" would consent); N.H. Rev. Stat. Ann. § 153-A:18 (2005) ("No licensed emergency medical care provider or any health professional shall be subject to civil liability based solely upon failure to obtain consent in rendering emergency medical services [as defined by N.H. Rev. Stat. Ann. § 153-A:2(VI) (2005)] to any person, regardless of age, where the person is unable to give consent for any reason, including minority, and where there is no other person reasonably available who is legally authorized to give consent to the providing of such care, provided that the licensed emergency medical care provider, or health professional, has acted in good faith without knowledge of facts negating consent"). *Accord New Hampshire Practice Series: Personal Injury: Tort and Ins. Practice* § 6:05 (2005) (citing and quoting N.H. Rev. Stat. Ann. § 507-E:(2005)).

necessary to protect the young person's health. As one textbook explains in reference to civil liability:

> [W]hen a minor is in need of urgent medical attention, the physician or other health service provider must be *encouraged* to provide treatment free from the fear of liability, thereby enabling the professional to attend to the patient's need without first compromising his or her best judgment.

Morrissey, et al., *supra* note 2, at 53.[6] In situations when doctors may face *criminal* liability for treating a minor without parental involvement – as is the case with the New Hampshire Act – there is even more reason to ensure that doctors should be permitted to "attend to the patient's need" in emergency situations free from "fear of liability." *Id. Accord Colautti v. Franken*, 439 U.S. 379, 396 (1976) (recognizing that potential for criminal liability may have a "profound chilling effect" on physicians' willingness to perform abortions as indicated by medical judgment).

Because it is so important that minors receive necessary emergency care without delay, the American

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[6] *Accord Sullivan v. Montgomery*, 279 N.Y.S. 575, 577 (N.Y. Cty. Ct. 1935) ("To hold that a physician or surgeon must wait until perhaps he may be able to secure the consent of the parents ... before ... giving to the person injured the benefit of his skill and learning, to the end that pain and suffering may be alleviated, may result in the loss of many lives and pain and suffering which might otherwise be prevented"); *Luka*, 136 N.W. at 1111 ("[N]o rule should be announced which would tend ... to deprive sufferers of the benefit of [medical] services"); *Jackovach*, 237 N.W. at 451 ("If the surgeon is not to be permitted to honestly use his best judgment upon the necessity for an operation, without waiting to get the consent of either the patient or his parents, then is the skilled hand of the expert stayed by an unreasonable rule, often to the detriment of the patient and humanity at large.").

Academy of Pediatrics, in a policy statement endorsed by the American College of Surgeons, the Society of Critical Care Medicine, and the American College of Emergency Physicians, cautions that "[a]ppropriate medical care for the pediatric patient with an urgent or emergent condition should *never* be withheld or delayed because of problems with obtaining consent." American Academy of Pediatrics, Committee on Pediatric Emergency Medicine, *Policy Statement: Consent for Emergency Services for Children and Adolescents* (Mar. 2003), http://aappolicy.aappublications.org/cgi/content/full/pediatrics;111/3/703 (emphasis added). Indeed, the American Academy of Pediatrics cautions doctors that in certain circumstances, federal law may *require* them to act quickly in emergency situations even if parental consent has not been obtained. *Id.* (citing and discussing 42 U.S.C. § 1395dd (2005), the federal statute that imposes requirements for treatment on hospital emergency departments).

There is no reason why young women and doctors should be required to go to court to obtain permission for emergency abortion procedures when obtaining judicial permission is not required in other types of medical emergencies. The record here establishes – and other briefs before this Court discuss in detail – the health-threatening situations that require emergency abortion procedures, in which any delay in the procedure increases the potential negative consequences.

For instance, the Declaration of Dr. Wayne Goldner, Joint Appendix ("J.A.") 23-26, ¶¶ 8-15, describes several specific conditions that could require immediate abortion to protect a minor's health, including: (1) preeclampsia, or pregnancy-related hypertension, which may result in liver or kidney disruption, bleeding, vision loss, or seizures; (2) premature rupture of the membranes surrounding a fetus, which can lead to an infection of the placental lining called chorioamnionitis, creating the risk

of scarring of the reproductive organs and resultant infertility, chronic pain, and abdominal abscess; (3) spontaneous chorioamnionitis, which can result in serious, chronic pain, loss of future fertility, or damage to major organ systems; (4) other pelvic infections with similar risks of infertility and future chronic pain; and (5) heavy bleeding from the uterus, creating the risk of dangerously low blood pressure, permanent kidney and liver damage, and infertility.

Similarly, the *amicus* brief submitted by the American College of Obstetricians and Gynecologists, the American Medical Association, the New Hampshire Medical Association, and a variety of other leading medical groups explains in detail the potential threats to young women's health during pregnancy that may require immediate abortion procedures, as well as the potential harms that minors may suffer if such necessary immediate medical care is not available to them. *See* Brief for the American College of Obstetricians and Gynecologists, *et al.*, as *Amici Curiae*.

In light of these substantial health concerns and the delay inherent in requiring a court proceeding, precisely the same considerations that support the rule that doctors should be able to exercise medical judgment quickly in all other emergency situations also compel the conclusion that doctors should be permitted to perform emergency abortions necessary to preserve women's health without first going to court.

II. Exempting Emergency Abortions From the General Rule Regarding Medical Care in Emergencies Will Threaten Young Women's Health.

Requiring young women and their doctors to go to court to obtain judicial permission for necessary emergency abortion procedures will not only be an anomaly – because, as discussed above, physicians are

permitted to act appropriately to provide immediate treatment in other medical emergencies without first going to court – it will also necessarily add delay to the process and thus further threaten young women's health. The fact is, for a number of reasons, requiring a pre-procedure court hearing simply will not effectively replace a statutory health exception.

First, requiring doctors to delay emergency care will necessarily endanger young women's health. Requiring a young woman and her doctor to obtain court permission in medical emergency situations will add such delay, even if immediate court access were available – and it is not. *Second*, relying on New Hampshire's bypass provision is particularly problematic because the provision does not ensure the kind of immediate access to courts that even the State concedes is necessary. *Third*, nationwide experience in states with judicial bypass mechanisms demonstrates that courts may not be easily accessible to minors under routine circumstances. The problems minors face in accessing courts in other states raise questions about whether New Hampshire courts would be accessible in the emergency context.

A. The Judicial Process Itself Will Create Delay, Endangering Minors' Health.

Requiring judicial permission for emergency abortions will inevitably add delay to the procedure, endangering young women's health. In a health-threatening emergency, the minor and her doctor face a situation in which any delay in providing an abortion may result in permanent damage to the minor's health.[7] Attempting to locate parents, and learning about the

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[7] *See* J.A. 23 (Decl. of Dr. Wayne Goldner, M.D. ¶ 7); Brief for the American College of Obstetricians and Gynecologists, *et al.*, as *Amici Curiae*.

bypass procedure if they cannot be located for immediate notification, takes time. Locating a judge and scheduling a hearing takes time. Preparing for and going through a judicial hearing takes time. In an emergency situation when every hour or minute counts, requiring judicial intervention may spell the difference between damaging and preserving a minor's health.[8]

Moreover, the bypass court will be required, on a moment's notice and with little opportunity for a detailed proceeding, to assess an area in which the judge will almost certainly have little knowledge before the hearing. The court will have to learn about a complex medical condition and decide whether an abortion without parental notification is in the young woman's best interest.

In a similar context, the New Hampshire Supreme Court has recognized that the judicial branch is not an acceptable substitute for permitting the physician to act in emergency circumstances. In *Opinion of the Justices*, 465 A.2d 484 (N.H. 1983), the New Hampshire court considered a legislative proposal that doctors be permitted to administer medication and/or treatment to

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[8] Moreover, the delay caused by the judicial proceeding will be added to the inevitable delay that occurs even before judicial permission for a procedure is sought. The young woman first must seek treatment, of course, before a procedure may be performed. Further delay is inherent in the doctor's examination and diagnosis, her determination that an immediate abortion is medically indicated, and her discussions of the minor's health and prognosis, and the necessity of an emergency abortion, with the minor herself. The doctor and minor must also discuss whether the minor's parents are available, whether the minor wishes to notify them, and then must attempt to locate parents if the minor desires parental involvement. Requiring the minor and doctor to seek *judicial* permission to perform the emergency abortion adds unnecessary additional delay.

patients who had been involuntarily committed, based on the *initial* determination that commitment was appropriate. Rejecting that proposal, the court made plain that there were emergency situations in which administration of medication or treatment without the patient's consent would be appropriate and further made plain that a judicial determination in such circumstances was not required. *Id.* at 490 ("[W]e do not imply that a judicial finding of 'emergency' is constitutionally required . . . [S]uch a finding would clearly be impractical because of the urgent need for treatment in emergency situations.").

Other courts similarly question the efficacy of judicial interjection into complicated medical emergencies at all – even in cases when court involvement might be arguably necessitated because a necessary consent for the procedure has actually been refused. As the Court of Appeals for the District of Columbia has noted, emergency judicial proceedings are fraught with difficulty and less likely than more deliberative proceedings to produce a correct result:

> [A]ny judicial proceeding in a case such as this will ordinarily take place – like the one before us here – under time constraints so pressing that it is difficult or impossible for the mother to communicate adequately with counsel, or for counsel to organize an effective factual and legal presentation in defense of her liberty and privacy interests and bodily integrity.

In re A.C., 573 A.2d 1235, 1248 (D.C. 1990); *see also* Janet Gallagher, *Prenatal Invasions & Interventions: What's Wrong With Fetal Rights*, 10 Harv. Women's L.J. 9, 49 (1987) (describing "procedural shortcomings rampant" in cases of medical emergencies).

B. New Hampshire's Statute Will Not Ensure Immediate Judicial Access in Medical Emergencies.

The State does not even attempt to argue that there is some independent State interest requiring *judicial* permission for emergency abortion procedures when a minor's health is threatened, rather than permitting doctors to act immediately to preserve patient health as they do in other medical emergencies. Instead, the State claims only that a requirement for judicial permission will not *harm* young women because access to courts and judicial decisions will be immediate and courts will "[c]ertainly" authorize abortions necessary to preserve a minor's health "within minutes, if necessary." Pet. Br. at 23.

Even if the State's claim of immediate court access were correct, the requirement that minors and doctors obtain judicial permission for an emergency abortion procedure itself adds delay, which will threaten young women's health. *See supra* § II.A. There is, moreover, no evidence to support New Hampshire's claim that young women and their doctors will have immediate access to the courts in emergency situations, particularly when those situations arise, as they inevitably will, after court hours and on weekends and holidays.[9]

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9 In addition, if New Hampshire's judicial bypass system were to function as a replacement for a statutory emergency health exception, the serious potential confidentiality issues recognized by the First Circuit, *see Planned Parenthood of N. New England v. Heed*, 390 F.3d 53, 64-65 (1st Cir. 2004), would be compounded. Young women seeking court permission for emergency medical care would face the prospect of disclosing the details of their medical condition as well as their pregnancy and desire for an abortion. Moreover, potential loss of confidentiality might lead young women not only "to delay or decline to seek an abortion out of fear that her parents would

To the contrary, the Superior Courts, District Courts, Probate Courts, and Family Division Courts are only open Monday through Friday, with business hours and telephone access hours ranging from 8:00 am until 4:30 pm. *See* New Hampshire Judicial Branch, *Find Your Court*, http://www.courts.state.nh.us/courtlocations/index.htm. The courts are also closed on twelve holidays during the year. New Hampshire Judicial Branch, *2005 Court Holidays*, http://www. courts. state.nh.us/ sitewidelinks/court_holidays.htm. The New Hampshire Judicial Branch's website offers no guidance for how a person in an emergency situation may access a court or a judge after hours, on weekends, or on holidays. *Id.*; *see also* New Hampshire Judicial Branch, *Frequently Asked Questions, What Hours are the Courts Open*, http://www.courts.state.nh.us/sitewidelinks/faqindex.htm #COURT%20HOURS (no information on emergency access to courts or judges).

Calls placed to the New Hampshire courts after hours and on weekends confirm that no telephone or voice mail mechanism is in place to guide people in emergency situations who require access to the courts. Some courts had no voice mail messages at all. There was no information for reaching an "emergency judge" after hours or on holidays provided on *any* court's voice-mail system. The majority of voice-mail messages simply advised callers that the court was closed and offered to permit them to leave a voice mail message or to dial a

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find out," *id.* at 64, but also to delay or decline to seek necessary *medical* treatment for a health-threatening medical condition. *Accord* Diane Reddy et al., *Effect of Mandatory Parental Notification on Adolescent Girls' Use of Sexual Health Care Services*, 288 JAMA 710 (2002); American Academy of Pediatrics, *The Adolescent's Right to Confidential Care When Considering Abortion*, 97 PEDIATRICS 746, 749 (1996) ("even a perceived lack of confidentiality in health care regarding sexual issues deters [minors] from seeking services").

specific extension. A few court messages advised callers to call either 911 or the police if they faced an emergency or sought a domestic violence restraining order.

No procedures to ensure immediate access to courts had been established when the enforcement of the law was enjoined on December 29, two days before it was to go into effect. Nor does the statute require the kind of immediate *decision* necessary to address health emergencies, even if 24/7 access was in fact provided. N.H. Rev. Stat. Ann. § 132:24 (2005) (requiring decision within seven days).

As one court considering a similar 24/7 access provision explained:

> The statutory requirement that minors shall have access to the trial and appellate courts 24 hours a day, 7 days a week is meaningless.... [B]y local rule the trial courts are open only during regular business hours. Even if courts have 24 hour drop boxes for 24 hour filing of documents, this is not around the clock access to courts. Judges, law clerks, court reporters, and others necessary for judicial action are not available on a 24 hour basis, seven days a week. This provision, therefore, assures nothing by way of expedition....

Planned Parenthood of Southern Arizona v. Lawall, 180 F.3d 1022, 1031 (quoting district court's opinion), *amended on other grounds, reh'g den'd*, 193 F.3d 1042 (9th Cir. 1999).

New Hampshire, however, claims that state courts are currently accessible to address emergency situations "regardless of the time of day or night" in instances of domestic violence cases, search and arrest warrants in criminal cases, or child protection orders. Pet. Br. at 22. These situations are different, however, because they mandate *police involvement* in seeking emergency court intervention – unlike the emergency abortion context, which would leave it to a woman and her doctor to locate

a judge after-hours or on a weekend or holiday and schedule an emergency hearing. In fact, the sole state statutory scheme that the State cites in support of its claim that courts are already available around-the-clock (Pet. Br. at 22) requires *police officers* to assist in seeking emergency telephonic protective orders from courts. N.H. Rev. Stat. Ann. § 173-B:10(d) (2005); *see also id.* § 173-B:4 (2005) (telephonic domestic violence orders must be issued "to a law enforcement officer"). Consistent with this mandate, the New Hampshire Judicial Branch website advises people who are seeking emergency domestic-violence-related protective orders after hours or on weekends or holidays to call the police, who will then help the complainant locate and call a judge.[10] The court's own protocols make plain, moreover, that the method for

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10 New Hampshire Judicial Branch, *Domestic Violence Restraining Orders*, http://www.courts.state.nh.us/superior/selfhelp/Restraining%20Orders.htm. *See also* New Hampshire District Court, *Domestic Violence Case Protocols*, Ch. 3, Protocol 3.1, http://www.courts.state.nh.us/ district/protocols/dv/index.htm (protocol for emergency telephone hearing requires *a police officer* to take a report of abuse, assist the plaintiff in filling out the form, locate a judge, and request the verbal order for protection); New Hampshire District Court Improvement Project, in Cooperation With the Family Division and N.H. Probate Court, *Protocols Relative to Abuse & Neglect Cases and Permanency Planning*, Ch. 3 (Apr. 2003), http:/www.courts.state.nh.us/district/protocols/abusenegprotocol.htm (describing requirement that *police officer* seek 24-hour order regarding protective custody for children removed from homes in emergency circumstances); New Hampshire Bar Ass'n, *Domestic Violence: It Helps To Know The Law* (May 2000), http://www.nhbar.org/for-the-public/domestic-violence-it-helps-to-know-the-law.asp ("If you are in immediate danger of domestic abuse and no court is open, you may get an emergency protective order by contacting the nearest police department. A police officer can help you fill out the form proper and reach a judge by telephone").

locating judges and scheduling emergency hearings is hit-or-miss, even for the police. Police officers are provided with judges' home numbers and directed to call around until they happen to locate an available judge.[11]

C. Experience in Other States Demonstrates that the Judicial Bypass Alternative Is Not Sufficiently Expeditious or Accessible To Protect Critically Ill Young Women.

Finally, experience in other states with existing judicial bypass laws reinforces the conclusion that courts in New Hampshire simply cannot function as a substitute for a medical emergency exception. Even in states with long-established judicial bypass systems, delays and bureaucratic hurdles imposed by the court system to obtaining a judicial bypass are common.

Many courts in states with judicial bypass laws are uninformed about their state's judicial bypass law and ill-prepared to accommodate even non-emergency requests for a judicial bypass. *See, e.g.*, Helena Silverstein, *Road Closed: Evaluating the Judicial Bypass Provision of the Pennsylvania Abortion Control Act*, 24 LAW & SOC. INQUIRY 73, 81 (1999); Helena Silverstein & Leanne Speitel, *Honey, I Have No Idea: Court Readiness to Handle Petitions to Waive Parental Consent for Abortion*, 88 IOWA L. REV. 75 (2002).

For instance, Alabama enacted a parental consent law that went into effect in 1987. *See* Silverstein, *supra*,

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[11] New Hampshire Judicial Branch, District Court, *Domestic Violence Case Protocols*, Ch. 3, Protocol 3.1, http://www.courts.state.nh.us/district/protocols/dv/ index.htm (advising police officers, who are provided with judge's home telephone numbers, to "first try to reach a judge" from the court where the plaintiff resides, and if "unable to reach any judge" assigned to that court, then "try to reach a judge who resides in a city or town close to where the plaintiff resides").

Honey, I Have No Idea, 88 Iowa L. Rev. at 84. But a 2001 study, conducted *nearly fifteen years after the law went into effect*, illustrated that only half of the counties in the state were prepared to implement the judicial bypass. *Id.* at 88-91. These thirty-four counties were judged "prepared" because they showed knowledge of the bypass process, specifically that the hearing was confidential and the minor had a right to a court-appointed attorney. *Id.* Yet, even out of these "prepared counties," only five provided immediate and complete responses to the initial request for information. *Id.* at 94. The others required the caller to make anywhere from three to twelve phone calls, pressing court personnel to receive correct information. *Id.* Callers were often initially misinformed about the availability of the judicial bypass with answers such as: "The last time I heard, a new law was passed that said that was no longer legal .... You'd have to have parental permission." *Id.*

Even among the "prepared" courts in Alabama, personnel who answered the phone provided misleading information about how quickly the petition would be heard. *Id.* at 94-95. For example, in Alabama, even though the statute requires courts to rule on petitions in seventy-two hours, in the majority of "prepared" counties, callers did not receive accurate information on their first phone call regarding how quickly a bypass petition would be heard.

The response in the one-half of unprepared counties is more troubling. Many personnel expressed doubt that the minor could obtain a court order to avoid parental consent in *any* court. *Id.* at 101. One respondent told a caller: "I have no idea Ma'am, I don't know if a judge gives permission like that or not. We've never had a case like that." *Id.* Others said "I talked with our juvenile court judge. And he said that was no longer a law, and that they could no longer do that"; "She has to have her parent's permission. In the state of

Alabama they're required to have their parent's permission"; "There is no such thing Ma'am, not through our court system." *Id.*

Other court personnel suggested the court would not grant the bypass petition. Representative of these comments is this court employee's answer to a request for information about how to obtain permission for an abortion without informing her parent: "Honey, I have no idea, I just have no idea. I feel like I don't believe a judge or even a lawyer actually would do that. . . . I don't believe it would be in the best interest for a judge or a lawyer to make consent like that without the minor's parents knowing about it." *Id.* at 102. Another employee advised the caller that her petition for a judicial bypass would not be granted because the judge "doesn't believe a child should have this done without her parents." *Id.* at 103. The employee further discouraged the minor by stating that the judge had not granted a petition for a minor advised by her doctor to obtain an abortion for medical reasons. *Id.*

Alabama's inadequate attempts to implement constitutionally sufficient judicial bypass proceedings are mirrored in other states in which similar research has been conducted. Nearly four years after Pennsylvania's parental consent provision took effect, two-thirds of its county courts remained unprepared to handle judicial bypass inquiries. *See* Silverstein, *supra*, *Road Closed,* 24 Law & Soc. Inquiry 73. In calls made to state courts, researchers discovered that only eight of Pennsylvania's sixty judicial districts were able to provide complete information about the parental involvement law, and even that information was not easy to obtain. *Id.* at 81-82.

The most common response the researchers received was that the caller would have to get an attorney, even though Pennsylvania's parental involvement law requires the court to advise the minor

that she has a right to court appointed counsel. *Id.* Many simply said to make some phone calls or to look in the yellow pages. *Id.* at 83. Although some court personnel mentioned that papers could be filed, none were able to tell the callers more specifically what was required. *Id.* at 85. At one point the researchers even spoke to a judge who, although unfamiliar with the law and unable to tell the caller about it, adamantly refused to hear her case. *Id.* at 87-88.

Experience in other states also confirms that not all judges are willing to hear bypass petitions. For instance, four of the nine judges on the Shelby Circuit Court in Memphis Tennessee are unwilling to hear bypass applications. Adam Liptak, *On Moral Grounds, Some Judges Are Opting Out of Abortion Cases*, The New York Times, September 4, 2005, *available at* http://www.nytimes.com/2005/09/05/national/04recuse.html?oref=login&pagewanted=print (citing one instance in which bypass judge explained that "[t]aking the life of an innocent human being is contrary to the moral order . . . . I could not in good conscience make a finding that would allow the minor to proceed with the abortion"); *see also* Suellyn Scarnecchia & Julie Kunce Field, *Judging Girls: Decision Making in Parental Consent to Abortion Cases*, 3 MICH. J. GENDER & L. 75, 85-86 (1995) (citing data that in Minnesota and Massachusetts, some judges are not available to hear parental involvement cases). In a situation in which a minor and her doctor are trying to locate a judge to hear an immediate bypass petition in a medical emergency, particularly when the courts are closed, the fact that some judges may not be willing to hear bypass proceedings at all could result in the bypass being unavailable or available only after delay that further threatens the young woman's health.

The research in these other states demonstrates the difficulty courts have in guaranteeing timely and confidential bypass procedures for healthy minors. This experience cautions that doctors and minors may be

frustrated if they are required to seek immediate court hearings to safeguard the health of sick minors.

CONCLUSION

This Court should reject New Hampshire's invitation to substitute the judicial bypass procedure for a statutory health exception. In emergency situations, established law and medical practice permit doctors to act quickly to address medical emergencies, *without* first going to court. *See supra* § I. In order to cure the constitutional infirmity in its Parental Notification Act, however, New Hampshire suggests that minors and doctors should be required to seek and obtain prior court permission for emergency abortion procedures necessary to preserve minors' health. Requiring court permission for emergency abortions will create an unwarranted and unwise exception to the general rule permitting doctors to act in emergency situations, one that will necessarily

create delay and threaten minors' health. The judgment of the First Circuit should be affirmed.

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THE AMICI ORGANIZATIONS

The Center for Adolescent Health & the Law supports laws and policies that promote the health of adolescents and their access to comprehensive health care. The Center conducts research, analyzes laws and policies, prepares and disseminates publications, provides training and technical assistance, and engages in advocacy. The Center's work addresses a broad range of issues influencing the financing, delivery, and utilization of comprehensive health services for adolescents. The Center's work falls into two primary program areas that together encompass the majority of barriers that adolescents must overcome to have access to comprehensive health care: consent and confidentiality; and financial access to services.

Jane's Due Process, Inc. (JDP) is a non-profit organization incorporated in 2001 to create a statewide response in Texas to minors seeking abortion services under the Texas parental notification law. Jane's Due Process has received in excess of 5,000 hotline calls from callers in at least 127 Texas counties and has screened 1,903 minors for services as of the end of 2004. JDP's website receives an average of 12,000 visits per month. Of the 1,903 minors screened, 35% report being unable to contact a parent because she or he is missing, deceased, or incarcerated. Along with a 24-hour toll-free hotline and pro bono lawyer referral program, JDP offers help with transportation to medical and legal appointments, childcare, and overnight accommodations, as well as financial assistance for pre-court sonograms and, when necessary, subsidies to cover the increased cost of an abortion procedure due to delays by the legal system.

The Judicial Consent for Minors Lawyer Referral Panel is an association of over 100 Massachusetts lawyers who represent minors seeking judicial consent for abortion under Mass. Gen. Laws. ch. 112, § 12S. The Panel is sponsored by the Women's Bar

Association of Massachusetts and the National Lawyers Guild. The Panel has operated since the Massachusetts judicial bypass went into effect in April, 1981. It is led by a steering committee which keeps in regular touch with Panel attorneys, reviews summaries of hearings, prepares legal updates, and meets with clerks and judges concerning problems in implementing this law.

The Juvenile Law Center (JLC) was founded in 1975 as a non-profit legal organization. JLC works on behalf of children who have come within the purview of public agencies – for example, abused or neglected children placed in foster homes, delinquent youth sent to residential treatment facilities or adult prisons, or children in placement with specialized services needs. Although JLC primarily serves the children of Pennsylvania, it regularly lends its expertise to national child advocacy efforts.

With more than 150,000 members, the **National Association of Social Workers (NASW)** is the largest organization of professional social workers in the world. The **National Association of Social Workers, New Hampshire Chapter**, represents 840 members. Created in 1955 by the merger of seven predecessor social work organizations, the purposes of NASW include improving the quality and effectiveness of social work practice in the United States and developing and disseminating high standards of social work practice, concomitant with the strengthening and unification of the social work profession as a whole. NASW's members are highly trained and experienced professionals who counsel individuals, families, and communities in a variety of settings, including schools, hospitals, mental health clinics, senior centers, and private practices. The NASW policy, "Adolescent Pregnancy and Parenting," supports a range of services to help prevent teen pregnancy including "safe, legal, affordable, and confidential health and reproductive health services, including sex education,

contraception, pregnancy testing, abortion, prenatal care, birthing services, postnatal care, and pediatric care, especially well baby services . . . ."

The **National Center for Youth Law (NCYL)** is a non-profit organization located in Oakland, California. Since 1970, NCYL has worked to improve the lives of poor children nationwide. NCYL provides representation to children and adolescents in class action litigation and other cases which have broad impact. The Center also engages in legislative and administrative advocacy at the national and state levels. NCYL provides support for the advocacy efforts of others through its legal journal and training programs, and by providing technical assistance to other advocates for youth nationwide. One of NCYL's particular concerns is access to critical health care for adolescents.

The **Women's Bar Association of Massachusetts (WBA)** is a statewide professional organization committed to the protection of the rights of women before the court system and regulatory bodies, in the state and federal legislatures, and in society generally. The WBA has filed amicus briefs with the state and federal courts in matters involving reproductive health, reproductive rights, sex discrimination, sexual harassment and equitable treatment of women by the courts, legislature and regulatory bodies. In particular, the organization has participated as an amicus and worked on legislation concerning access to reproductive health clinics, restrictions on abortion counseling, and minors' access to abortion. The WBA is a sponsor of the Judicial Consent for Minors Lawyer Referral Panel, an association of over 100 Massachusetts lawyers who represent minors seeking judicial consent for abortion under M.G.L. ch. 112, § 12S.

The **Women's Law Project (WLP)** is a non-profit legal advocacy organization in Pennsylvania. Founded in 1974, the Law Project works to advance the legal and

economic status of women and their families through litigation, public policy development, education, and one-on-one counseling. Throughout the past thirty-one years, WLP has played a leading role in the struggle to protect women's privacy in the context of reproductive health decisions. WLP served as co-counsel for plaintiffs in *Ferguson v. City of Charleston*, 532 U.S. 67 (2001), *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), and *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986).